part of the writ which deals with the persons to whom the writ is to be addressed. The "parties interested in the ship" (who may be mortgagees, salvors, or other persons possessing maritime or statutory liens) are entitled to intervene in the suit on filing an affidavit of interest but until they do, they have no status in the proceedings and the action proceeds in the ordinary way against the named defendants, namely, "The owners of the ship . . . . .". But if the omission of the words "parties interested in the ship" makes the writ a nullity, as counsel for the intervener contends, the defendants could have it set aside *ex debito justitiae*, even in cases where there was no one interested in the ship except themselves. On the other hand, if the omission of the words "parties interested in the ship" does not make the writ a nullity, the subsequent proceedings would be valid, and the "parties interested in the ship", if there were any, would be entitled to intervene on filing an affidavit of interest notwithstanding the irregularity. If it be said that they would not know they were entitled to intervene if the words "parties interested in the ship" were omitted from the writ, the answer is that as soon as the writ was served by nailing it to the mast of the vessel, they would know, indeed all the world would know, since nailing a writ to the mast is notice to the world that the ship was being proceeded against *in rem*, and therefore they would know that their interests in the *res* were impleaded. In my opinion no mischief need result from treating an omission of this kind as an irregularity and certainly none has occurred in the present case.

In arriving at my conclusion that this is an irregularity and not a nullity, I have borne in mind the words of Lindley L.J. in *Fry v. Moore*[4]. "I shall not attempt" he said, "to draw an exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served . . . . .". So, in the present case, the correct view, in my judgment, is that the writ was properly issued against the Owners of the L.S.T. "O. Sambaur" as defendants but it was improperly completed owing to the omission from the citation of the words "parties interested in the ship." I am of the opinion, therefore, to quote Lindley L.J.'s words, "that this proceeding was rather an irregularity than a nullity" and accordingly in my view Order 63 applies and an amendment may be allowed. I, therefore, order that the motion be dismissed and that the writ be amended by inserting in the citation the words "and the parties interested in the said ship" after the words "The Owner of L.S.T. 'O. Sambaur' lying at Singapore Harbour, Singapore."

Motion dismissed.

Solicitors: *Allen & Gledhill; Murphy, Dunbar & Chung.*

THE "O. SAMBAUR" (No. 2) WINMORE CORPORATION LTD. v. THE OWNER OF L.S.T. "O. SAMBAUR"

[O. C. J. (Whyatt C.J.) April 14, 1958]

[Singapore — In rem Admiralty Suit No. 13 of 1957]

Practice and Procedure — Action in Rem — Entry of appearance and caveat by defendant after judgment in default has been entered — Application for payment out of money in Court — "Any person" within r. 22(3) of Admiralty Procedure Rules — Whether includes "owner" — Stay of Order.

The point for decision in this case was whether the Court was prevented from making an order for payment out to the plaintiffs and the intervener from the fund in Court representing the proceeds of the sale by the marshal of the vessel L.S.T. "O. Sambaur" by reason of the fact that a person named Alexis Fournier des Corats resident in Phnom Penh, Cambodia, claiming to be the registered owner of the vessel had entered an appearance and a caveat after the plaintiffs have obtained judgment in an admiralty action *in rem* and after the arrest and sale of the said vessel.

Held: (1) the appearance entered on behalf of Alexis Fournier des Corats as registered owner of the vessel was not, in fact, an appearance since he had already ceased to be registered owner;

(2) a defendant is not entitled to appear as of right after judgment;

(3) an owner of a vessel is not entitled to enter a *caveat* against payment out as he is not "any person" within the meaning of the Admiralty Procedure Rules, r. 22(3).

A stay is not granted as a matter of course. There must be special reasons shown.

Cases referred to:—

(1) *The James W. Elwell* (1921) P. 351.

(2) *Howarth v. Howarth* (1884) 9 P.D. 218.

MOTION IN ADMIRALTY SUIT.

M. Karthigesu and *A. M. Ghows* for the plaintiffs.

T. G. Dunbar for the intervener.

C. H. Smith for the registered owner and caveator.

Cur. Adv. Vult

Whyatt C.J. : — The point for decision in these proceedings is whether the Court is prevented from

making an order for payment out to the plaintiffs and the intervener, Lucien Bernaroya, from the fund in Court representing the proceeds of the sale by the marshal of the vessel L.S.T. "O. Sambaur", by reason of the fact that a person named Alexis Fournier des Corats of Phnom Penh, Cambodia entered an appearance and a caveat against payment out the day before the plaintiffs' and the intervener's applications for payment out were heard by this Court. There is no doubt, of course, that where an appearance and a caveat have been properly entered, the Court will not order payment out until the issues raised by the appearance and the caveat have been disposed of, but in the present case it has been strenuously contended by counsel on behalf of the intervener, Lucien Bernaroya, that the appearance and the caveat have no legal validity and consequently the Court should make an order for payment out in the terms of the motions.

I should mention at this stage that counsel for Alexis Fournier des Corats laid special emphasis on the fact that his client's appearance was as "registered owner" of the vessel and he contended that an appearance qualified in this way was different in law from an appearance simply as "owner", (which is, of course, the usual form of appearance in Admiralty proceedings) but he was somewhat vague as to the effect in law of the difference. Counsel furthermore informed the Court that the reason for entering an appearance in this qualified form was that the beneficial owner of the vessel was the intervener, Lucien Bernaroya, and that his client, Alexis Fournier des Corats, was merely the nominal registered owner when he entered an appearance in this suit. It seems clear, however, that Alexis Fournier des Corats was not the registered owner of the L.S.T. "O. Sambaur" when he entered an appearance in these proceedings, for the records of the Court show that on the 14th March the Court approved the sale of this vessel by the marshal to the International Union Marine Corporation of Panama and that the marshal received the purchase money from that sale on the 31st March. Consequently Alexis Fournier des Corats had ceased to be the registered owner by the 10th April when he entered an appearance in these proceedings. It follows that if his appearance is based upon his being the registered owner of this vessel, as his counsel insisted that it was, there has been no appearance at all but merely what purports to be an appearance based upon a mistake of fact; and therefore that is the end of these proceedings so far as they depend upon the appearance entered on the 10th April. However, as counsel for the intervener, Lucien Bernaroya, argued this case on the footing that there was no distinction in law between an appearance as "registered owner" and an appearance as "owner" in proceedings of this nature, I will, out of deference to his arguments, deal with the case on the basis that the appearance was as owner of the vessel or of the fund in Court realized by the sale of the vessel.

In order to appreciate the force of the argument advanced on behalf of the intervener, it is necessary to refer briefly to the history of this matter. In December of last year, the vessel L.S.T. "O. Sambaur", of which the registered owner was at that time Alexis Fournier des Corats, was lying in the outer roads of Singapore Harbour. The plaintiffs, Winmore Corporation Ltd., had a claim for approximately $109,000 for bunkers and other necessaries supplied to the ship and on the 28th December 1957 they issued a writ *in rem* against "The Owner of L.S.T. 'O. Sambaur'" for this sum and on the same day a copy of the writ was nailed to the mast and the marshal seized the vessel by virtue of a warrant of arrest. A few days later, on the 3rd January 1958, Lucien Bernaroya, obtained a judgment in the High Court in default of appearance against Alexis Fournier des Corats for approximately $281,000 and on the following day, a writ of seizure and sale was issued at his request and the Sheriff attached the vessel.

Lucien Bernaroya subsequently intervened in the action brought by the plaintiffs but Alexis Fournier des Corats, at that time the registered owner, and of course, entitled to enter an appearance within the time prescribed in the writ, allowed these proceedings *in rem*, as he had allowed the proceedings *in personam* brought by Lucien Bernaroya, to go by default, and judgment was entered for the plaintiffs on the 14th March for $85,000, the balance of their claim for $109,000 being abandoned. On the 31st March the vessel was sold by the marshal and the proceeds paid into Court, and on the 8th April, the plaintiffs and the intervener Lucien Bernaroya each gave notice of motion that they would move the Court on the 11th April at 10.30 a.m. for payment out of the fund in Court. On the afternoon of the 10th April, Alexis Fournier des Corats entered an appearance as "registered owner" in the action *in rem* and prayed a caveat against payment out of any of the monies in Court standing to the credit of the action.

It is, I think, helpful to note at the outset that there are certain aspects of these proceedings which are strikingly similar to the facts in *The James W. Elwell*[1]. That was a case in which that very experienced Admiralty Judge, Mr. Justice Hill delivered an illuminating judgment on the principles to be applied and the procedure to be followed when, judgment having been obtained by default on a claim

for necessaries, the plaintiffs and the execution creditors move for payment out of a fund in Court realized by the marshal on the sale of a ship. The facts of the case were that the charterers of a ship obtained judgment against the owner for £7,512 damages in the King's Bench Division and the Sheriff took possession of the ship under a writ of *fi. fa.* Later the same day an action *in rem* was instituted for necessaries and the marshal arrested the ship and subsequently other writs *in rem* were issued for necessaries and wages. In none of these actions did the owners appear and judgments were therefore obtained by default. Eventually the ship was sold by the marshal, the proceeds paid into Court and motions made by the various plaintiffs and execution creditors for payment out of the fund in Court. The fund was insufficient to pay all the claimants and therefore the Court had to decide, to quote Hill J., "which of the claimants are entitled to claim against the fund and to determine the priorities". It will be observed that in that case, as in the present proceedings, the judgments were obtained by default; the ship was seized by both the marshal and the sheriff; and the claimants against the fund in Court comprised both execution creditors who had established their claims in actions *in personam* and plaintiffs who had established their claims in actions *in rem*. As in *The James W. Elwell*[1] proceedings, so in the present proceedings, the Court has to consider and determine two issues; first, which of the claimants are entitled to claim against the fund, and secondly, having determined which claimants are entitled to claim, to decide the priorities *inter se*.

Now when the plaintiffs in this action, the Winmore Corporation Ltd. and the execution creditor, Lucien Bernaroya, gave notice of motion on the 8th April for payment out of this fund, there were only two claimants and therefore the only question which could have come before the Court on the motions at that date were (a) whether the two claimants were entitled to claim against the fund, and (b) what were the respective priorities. The answer to the first question would have been that both claimants, that is to say, the necessaries man and the execution creditor, were clearly entitled to claim against the fund on the authority of *The James W. Elwell*[1], *supra;* and the answer to the second question would have been that, as a result of an agreement between the two claimants as appears from the terms of the execution creditor's motion, the plaintiffs were to receive $85,000 and the execution creditor the balance of the fund after paying the marshal's expenses.

How then, if at all, is the position altered by reason of the fact that between the 8th April when the notices of motion were issued and the 11th April when they came on for hearing, Alexis Fournier des Corats, who hitherto had ignored the proceedings, purported to enter an appearance as registered owner and a caveat against payment out of the fund in Court? At the hearing on the 11th April, he stated by his counsel that the real purpose of his entering an appearance at that stage was because he believed there were necessaries men with better claims to the fund in Court than Lucien Bernaroya, the execution creditor, and that he wanted their claims to be met out of the fund in Court, as otherwise they might seek to recover their claims from him by bringing actions *in personam;* counsel further informed the Court that so far as Alexis Fournier des Corats was concerned, he had no wish to obtain any of the fund in Court for himself. This somewhat surprising statement as to the reason for the action taken by Alexis Fournier des Corats demonstrates clearly, in my opinion, that he has misunderstood the scope and purpose of these proceedings. As Mr. Justice Hill pointed out very plainly in *The James W. Elwell*[1], *supra*, the purpose of proceedings of this nature in the Court of Admiralty is first, to decide which claimants are entitled to claim against the fund, and secondly, to determine the priorities between claimants, and since Alexis Fournier des Corats states he is not a claimant against the fund at all, then obviously his claim to appear and intervene in these proceedings fails *in limine*. It may well be that it would be more convenient to Alexis Fournier des Corats if necessaries men were paid out of the fund in Court in Singapore and if his other creditors were left to recover *in personam* in Cambodia, but that is quite irrelevant to the present proceedings, and it would, in my opinion, be contrary to the practice of the Court of Admiralty and without precedent, to allow a person to intervene in these proceedings for the purpose of achieving such a result, or indeed for any purpose other than for the purpose of making a claim against the fund.

In addition to these objections, counsel for Lucien Bernaroya further contended that on a proper construction of the Admiralty Procedure Rules, and the Supreme Court Rules, Alexis Fournier des Corats, (assuming him to be registered owner of the vessel, for the purpose of this argument) was precluded from

entering an appearance and a caveat at this late stage. The rule dealing with time for entering an appearance is Order 12 rule 11, the relevant extract from which reads: "A defendant may appear at any time before judgment". Counsel contended that this meant that a defendant might not appear, as of right, after judgment and in support of this view he referred to *Atkins,* Encyclopaedia of Forms and Precedents (Volume II page 439), where it is stated that if a memorandum of appearance is entered after judgment in default, it will stand in the event of the judgment being set aside; it followed therefore, in his submission, that unless and until the judgment is set aside, the appearance achieved nothing. I think this is a correct view and since in the present case Alexis Fournier des Corats has not moved to set aside the judgment obtained by default in the action *in rem,* but on the contrary, has informed the Winmore Corporation Ltd. by letter dated the 10th April that he has no objection to their claim being paid out of the fund in Court, it follows that the appearance entered on the 10th April has, as yet, achieved nothing.

I should perhaps at this juncture mention an argument advanced on behalf of Alexis Fournier des Corats on this point. It was said that the judgment in default was for only $85,000 and there had been no judgment for the balance of the fund in favour of Lucien Bernaroya or any one else, and therefore as to that part of the fund, Alexis Fournier des Corats was entitled to enter an appearance. This argument is, in my view, based on a misconception. Lucien Bernaroya was never at any time a claimant in the action *in rem.* He merely intervened in that action to protect his interest in the *res* as execution creditor for the amount of the judgment which he had obtained in an entirely different action, an action *in personam.* Any appearance by Alexis Fournier des Corats, therefore, in the action *in rem,* even assuming it had been entered within the time prescribed in the writ, could not have affected in any way Lucien Bernaroya's right to intervene in the proceedings to protect his interest, as an execution creditor, in the *res.*

As regards the caveat entered by Alexis Fournier des Corats, the rule dealing with this matter is Rule 22(3) of the Admiralty Procedure Rules, which reads as follows:—

"Any person desiring to prevent the payment of money out of Court shall file a notice and thereupon the Registrar shall enter a *caveat* in the *caveat* payment book hereinafter mentioned".

The argument of counsel for Lucien Bernaroya on this point was simple and cogent. He contended that Alexis Fournier des Corats, (assuming him to be the registered owner) was not a "person" within the meaning of this rule and cited in support of this view a dictum of Lindley L.J. in *Howarth v. Howarth*[2]. That was a case in which the Court of Appeal was called upon to construe section 7 of the Divorce Court Amendment Act 1860 the relevant extract from which reads: "Every decree for a divorce shall be a decree *nisi,* not to be made absolute till after the expiration of such time as the Court shall from time to time direct and during that period any person shall be at liberty to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the Court." Commenting on this section Lindley L.J. expressed himself thus: "That section provides that during the period there referred to any person shall be at liberty to show cause why the decree *nisi* should not be made absolute. Pausing there for a moment, let us consider the meaning of 'any person'. It has been decided, and properly, that 'any person' does not include the respondent. The respondent has other means of applying to the Court besides availing himself of intervention proceedings so far as I know 'any person' means anybody except the respondent and somebody who is the respondent in disguise, his agent or his puppet." So also in the present case, Alexis Fournier des Corats, assuming him to be the registered owner, had other means of applying to the Court to prevent the payment out of the fund in Court, namely, by entering an appearance to the writ *in rem* and therefore, by parity of reasoning "any person" in rule 22(3) does not include the registered owner. It is not enough that Alexis Fournier des Corats has chosen to treat this rule as applying to him, if upon its true construction, he does not fall within its terms, and I agree with the submission of counsel for Lucien Bernaroya that rule 22(3) does not apply to the owner of a vessel, whether or not he describes himself as "registered owner" or simply as "owner".

I reach the conclusion therefore that this eleventh-hour attempt of Alexis Fournier des Corats to prevent the payment out of the fund in Court fails, and I make an order in the terms of the motions of the Winmore Corporation Ltd. and Lucien Bernaroya.

Order accordingly.

After the above judgment was delivered Mr. C. H. Smith made an application for stay.

Smith: I ask for stay of execution for seven days to enable me to get further instructions from Alexis Fournier des Corats. I do not say now that he was the registered owner at the date of his appearance.

Dunbar: I oppose the application. There are no special circumstances shown. Mr. Smith has not mentioned when he first received instructions from his client.

The intervener, moreover, is an execution creditor. No terms or undertaking could be imposed or taken from Alexis Fournier des Corats as my client's judgment against him is far in excess of the value of the res.

Smith: I have not received instruction from my client to ask for a stay. Alexis Fournier des Corats is in Cambodia. I received a telegram this morning saying that he was coming to Singapore.

After hearing the arguments of counsel on the question of stay the learned Chief Justice refused the application and made the following remarks:

"I refuse a stay because no special reasons have been shown. The only reason advanced by Mr. Smith is that he hopes to get written instructions, in addition to cable instructions, from his client. He has not at present any instruction to ask for stay.

"I say that a stay is not granted as a matter of course. Special reasons should be shown. In the present case Alexis Fournier des Corats is out of jurisdiction; he came into the proceedings at the very last moment, and there is no affidavit to support the statements made on his behalf by his counsel at the hearing. The only fact which it has been possible to check, namely, whether he was a registered owner at the date of his appearance in these proceedings is shown to be false by reference to records of this Court. His counsel now admits this. He has further stated, by his counsel, that he is not making a claim on behalf of himself against the fund in Court. Why then should an order be made at the request of his counsel for an order staying payment out of this fund to a person who is already an execution creditor? Clearly there are no grounds for making such an order. Such special features as there are in this case are all against making an order for a stay, not for granting one."

Application dismissed.

Solicitors: *Allen & Gledhill; Murphy Dunbar & Chung; Donaldson & Burkinshaw.*

PALMER v. YOUNG & ANOR.

[Divorce Jurisdiction (Chua J.) November 26, 1957]

[Singapore — Divorce No. 21 of 1956]

Divorce — Petition for — Delay — Unreasonable — Dismissal.

In this case the parties were married in 1921 and in May 1945 the respondent committed adultery with the co-respondent. The respondent left the matrimonial home in September 1945 and from that day he has been living with the co-respondent. The respondent however continued to maintain the petitioner. On April 5, 1956 the petitioner filed a petition for divorce on the ground of adultery and desertion. She said that she did not take proceedings earlier because she had no means to do so and also because the respondent was maintaining her.

Held: there had been unreasonable delay in presenting the petition and there was no reason for exercising the Court's discretion in the petitioner's favour.

Cases referred to:—

(1) *Rickard v Rickard* (1921) 37 T.L.R. 26.

(2) *Llewellyn v. Llewellyn* (1955) 2 All E.R. 110.

DIVORCE.

Ong Swee Keng for the petitioner.

A. P. Rajah for the respondent.

Co-respondent unrepresented.

Chua J.: — The petitioner, Mavis Eva Maud Palmer, petitioned for divorce on the grounds (a) that the respondent, her husband, deserted her and (b) that the respondent had committed adultery.

The parties were married on the 29th January 1921. The Petitioner alleges that in May 1945 the respondent committed adultery with one Tan Buck Eng, the co-respondent in these proceedings, and that the respondent left the matrimonial home in September 1945 after they had a violent quarrel over the respondent's visits to Tan Buck Eng. The respondent from September 1945 went to live with Tan Buck Eng and is still living with her. Adultery is admitted by the respondent.

The respondent, however, continued to maintain the Petitioner from September 1945. He gave her $125 per month and paid for the City Council bills. In 1954 the respondent retired from the City Council and he bought a house for $6,000. The Petitioner and her children moved into this new house and the respondent continued to maintain her but the maintenance was reduced to $70 per month. In 1955 the respondent failed to maintain her and she took out a Summons against him and by agreement the respondent paid her $60 per month. The respondent is still maintaining her.

On the 5th April 1956 the Petitioner filed the present petition. She says that she did not take proceedings earlier because she had no means to do so and also because the respondent was maintaining her.

In this case there has been a delay of 10½ years. The Petitioner knew through all these years that the respondent was living with the co-respondent and she has been content to see her husband living in adultery. I do not believe that she did not take proceedings earlier because she had no means. The truth of the matter is that she did not care what the respondent did as long as he was maintaining